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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of Judgment of the District Court, which were not officially reported, appear at pp. 57-62 of the record. The opinion of the Court of Appeals is reported at 367 F.2d 137, and is also reproduced in the record at pp. 149-152.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 21, 1966. The petition of the Denver And Rio Grande Western Railroad Company

for rehearing was filed on October 7, 1966, and was denied on October 24, 1966. Certiorari was granted by this Court on January 9, 1967. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The statutory provisions involved are § 1391 of Title 28, United States Code and Rule 52(a) of the Federal Rules of Civil Procedure. They are fully set forth in Appendix A hereto. The provisions of the Judicial Code primarily involved in the decisions below are as follows:

> "Sec. 1391. Venue generally.
>
> • • •
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

QUESTIONS PRESENTED

1. In an action to recover damages for an unlawful strike, is venue proper as to the defendant labor union, an unincorporated association, in the judicial district in which the strike occurred and in which the defendant labor union represents the employees involved and conducts its representational activities on their behalf; or can the action be brought only in another judicial district, some thirteen hundred miles away, merely because the defendant labor union maintains its principal office in the latter judicial district?

2. Was the decision of this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), on a question of diversity jurisdiction intended, as the Court below concluded, implicitly to overrule the Second Circuit's decision in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), cert. denied, 372 U.S. 954, and other federal decisions holding that an unincorporated association is a resident for venue purposes of the judicial districts in which it is doing business?

3. Was it consistent or permissible for the court below, having purportedly ruled on the basis of *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), to conclude that venue can and must be laid at the unincorporated association's principal place of business, i.e., Cleveland, Ohio?

4. Where all of the evidence shows the General Chairman of a defendant labor union participated in the authorization, institution and conduct of an unlawful strike, may the Court of Appeals set aside the judgment of the District Court holding the General Chairman responsible, along with the union, for the damages accruing from such a strike?

STATEMENT

This action was brought by the Denver and Rio Grande Western Railroad Company against the Brotherhood of Railroad Trainmen, certain officers of the Brotherhood and members of the Brotherhood employed by the Rio Grande (R. 7). The suit sought to recover damages resulting from a strike by the Brotherhood against the Rio Grande in violation of the provisions of the Railway Labor Act (45 U.S.C.A. § 151 et seq). The Rio Grande is a corporation organized under the laws of the State of Delaware. It owns and operates a railroad system extending from Denver, Colorado Springs and Pueblo, Colorado, to Salt Lake City

and Ogden, Utah, with numerous branches on those lines. Its principal place of business is in Denver, Colorado, and 63 per cent of its line of road is situated in Colorado (R. 46, 52).

The Brotherhood of Railroad Trainmen, an unincorporated association which holds representation rights on most of the railroads in the United States,[1] consists of a Grand Lodge with headquarters at Cleveland, Ohio, and subordinate lodges located on the lines of such railroads (R. 8, 46). The Brotherhood is the designated representative of trainmen employed by the Rio Grande, the vast majority of whom work and reside in Colorado. As provided in the Brotherhood's Constitution and General Rules, the local lodges on each railroad elect a General Grievance Committee and a General Chairman thereof for the purpose of performing the Brotherhood's representation functions under the Railway Labor Act (R. 5-6).[2] On the Rio Grande, respondent R. E. Carroll was the General Chairman at the

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[1] The Thirty-first Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1965, shows that the Brotherhood represents one or more classes or crafts of railroad employees on 91 railroads. This data is limited to "selected rail carriers" and thus does not reflect fully the extent of the Brotherhood's representation rights. (Thirty-First Annual Report of National Mediation Board for the fiscal year ended June 30, 1965, pp. 78-86.)

[2] Some of the relevant provisions of the Constitution and General Rules of the Brotherhood appear in the record (R. 5-6). For the purpose of presenting the complete structure which the Brotherhood utilizes in the representation of railroad employees, additional provisions of the Constitution and General Rules of the Brotherhood are reproduced in Appendix B hereto. As required by § 201(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 431) the Constitution and General Rules of the Brotherhood are on file with the United States Department of Labor.

time of the strike involved in this litigation and at the time of the proceedings in the lower courts. Respondent Carroll maintains his headquarters at Denver, Colorado (R. 5-7, 11, 46-47, 73).

In accordance with the authority vested in him by the provisions of the Constitution and General Rules of the Brotherhood of Railroad Trainmen, General Chairman Carroll submitted certain claims to the First Division of the National Railroad Adjustment Board on behalf of employees of the Rio Grande, based on alleged violations of the collective bargaining agreement between the Rio Grande and the Brotherhood (R. 58). Subsequently, the National Railroad Adjustment Board issued awards 19372 and 19389 sustaining the claims (R. 58). The Board awarded a full day's pay to each claimant for each occasion on which it found a violation of the agreement, despite the fact that the claimants had suffered no monetary loss. Convinced that the payments called for by the awards were arbitrary and unreasonable, the Rio Grande declined to make the payments required by the awards.[1] In such circumstances, an enforcement action involving a review of the validity of the awards is authorized by Section 3, First(p) of the Railway Labor Act. The Brotherhood, however, chose to attempt to compel the Rio Grande to comply with the awards by calling a strike (R. 59).

On May 16, 1960, representatives of the Brotherhood advised the Rio Grande that the Brotherhood would call a

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[1] In an enforcement action instituted after the strike in question was found to be unlawful, it was held that nominal damages, rather than a full day's pay, was the proper measure of damages since the employees involved had not suffered any monetary loss as a result of the claimed violations of the agreement. *Brotherhood of Railroad Trainmen* v. *Denver and Rio Grande Western R. Co.*, 338 F. 2d 407 (10th Cir. 1964), cert. denied, 380 U.S. 972.

strike on that day to compel the Rio Grande to make payments under the awards (R. 147). The strike commenced and lasted until some hours after the United States District Court for the District of Colorado issued a temporary restraining order (R. 23, 73-75). The District Court and the Court of Appeals ultimately held the strike to have been in violation of the Railway Labor Act (45 U.S.C. § 151 *et seq.*). See *Denver And Rio Grande Western R. Co.* v. *Brotherhood of Railroad Trainmen,* 185 F. Supp. 369 (D.Colo. 1960), affirmed, 290 F. 2d 266 (10th Cir. 1961), certiorari denied, 366 U.S. 966. This action was subsequently brought in the United States District Court for the District of Colorado to recover damages accruing from diversions of freight to other railroads as a result of the unlawful strike.

Prior to the trial the Brotherhood moved to dismiss the complaint on the ground, among others, that venue was improper (R. 10-11). This motion was denied by the District Court on August 29, 1963 (R. 12). The District Court, concluding that it had jurisdiction of the parties and subject matter under 28 U.S.C. §§ 1331 and 1337, awarded the Rio Grande a judgment of $37,988.37 against the respondents (R. 57-62).

The Brotherhood appealed from the judgment entered by the District Court. The Court of Appeals reversed, ruling that *Steelworkers* v. *Bouligny,* 382 U.S. 145, implicitly constituted "a rejection of the principle espoused by the *Rutland* case," and holding that venue (1) did not properly lie against an unincorporated association where it did business but (2) was proper only at its principal place of business, which was Cleveland, Ohio. The Court of Appeals further held that the record did not show that respondent Carroll, the General Chairman of the Grievance Committee on the Rio Grande, had any responsibility for the illegal strike.

SUMMARY OF ARGUMENT

The determination of the District Court that the Brotherhood of Railroad Trainmen resides in the judicial district of Colorado for venue purposes under 28 U.S.C. § 1391(b) represented an eminently correct and generally accepted construction of the statute. Although Section 1391(b) of Title 28 does not define the requirement of residence with regard to unincorporated associations, the governing authorities at the time of its enactment, the legislative history of the statute, and the decisions of the Courts which have had occasion to consider the question all support the holding of the District Court. When the Judicial Code (Title 28) was revised in 1948, the prevailing and accepted authority held that an unincorporated association, considered to be an entity for venue purposes, was subject to the same venue requirements as those applicable to a corporation. Questions concerning the principles of diversity jurisdiction over such unincorporated associations were carefully and consistently distinguished from federal venue questions. When Congress revised the general venue provisions in 1948, it obviously did so in light of the prevailing judicial authorities with respect to venue requirements for unincorporated associations. Thus the provisions of Section 1391(c), defining residence for corporations as the judicial districts in which they are incorporated or licensed to do business or are doing business were intended to be, as the case law principle was, applicable also to unincorporated associations.

There is absolutely no indication in the legislative history of the revised venue provisions indicating any intent on the part of Congress to depart from the generally established rule that unincorporated associations are subject to the same venue requirements as corporations. Moreover, those most intimately concerned with the 1948 revision

have voiced general approval of the decisions holding, as the District Court held in the present case, that Section 1391(c) defines residence for unincorporated associations as well as corporations. It is also indisputable that these revisions of the Judicial Code were intended to liberalize venue requirements, as this Court has consistently held.

The Congressional purpose to regard unincorporated associations as residents of the judicial districts in which they pursue their business activities is indicated, insofar as labor unions are concerned, by the venue provisions of the Labor-Management Relations Act of 1947, providing that unincorporated labor unions may be sued in any judicial district in which they are engaged in representing or acting for employee members. Since this statute was enacted just prior to the revision of the Judicial Code in 1948, it reasonably reflects the Congressional purpose to make Section 1391(c) applicable to unincorporated labor unions, and the practical desirability of permitting venue to be laid in such districts.

The clear preponderance of the decided cases since 1948 adhere to the construction adopted by the District Court in the present case. These cases, following the basic approach of *Sperry Products* v. *Association of American Railroads,* 132 F. 2d 408 (2d Cir. 1942), have applied to unincorporated associations the same venue requirements as those applicable to corporations under Section 1391(c). The few contrary cases have involved no consideration of the purpose and effect of the 1948 revision of the venue statutes.

The decisions of this Court involving fundamental venue principles, and the record in the present case aptly demonstrate that the judicial district of Colorado was not only a fair but, indeed, the most appropriate forum. The liability upon which the action is based accrued in the judicial dis-

trict of Colorado as a result of the activities which the Brotherhood carried on in that district. Colorado is in fact the focal point for the exercise of the Brotherhood's representational authority with respect to petitioner's empolyees. Although the national entity is the certified representative, residents of Colorado discharge its duties and responsibilities with respect to petitioner's employees. It is only through the signature of respondent Carroll, a Colorado resident, that the Brotherhood is a party to the basic collective bargaining agreement applicable to petitioner's employees. Cleveland, Ohio, where the Brotherhood maintains its principal place of business, and where the Court of Appeals suggested that the action should be brought, simply has no real relationship to the basic activities and the significant facts giving rise to liability in the present case. As this Court has held, venue is primarily a concept of convenience and all of the considerations pertinent to the convenience of the parties point to the judicial district of Colorado as the proper forum.

The decision of this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145, does not warrant the result reached by the Court of Appeals. *Steelworkers* v. *Bouligny* involved questions relating exclusively to the diversity jurisdiction of federal courts. Accordingly, this Court did not rely on, discuss, or cite any cases dealing with venue or any considerations pertinent to venue problems. Consequently the Court of Appeals clearly erred in deciding that the result which it reached was required by this Court's opinion in *Steelworkers* v. *Bouligny*. The complete reliance of the Court of Appeals on the *Steelworkers* case clearly appears from the absence of any statutory, policy, or precedent analysis to support its holding.

Furthermore, even if *Steelworkers* v. *Bouligny* has any relevance to venue questions, the holding that the Brother-

hood can be sued only at Cleveland, Ohio, is at best not consistent with this Court's *Steelworkers* decision. If unincorporated associations are to be treated as aggregations of individuals for venue as well as diversity of jurisdiction purposes, the residence of the unincorporated Brotherhood would only be the residence of all of its individual members, not the place where it maintains it principal place of business. Since all members of a national union or a widespread unincorporated association will not all be found in any one judicial district, federal venue would never be proper under 1391(b), although Congress certainly intended that there be an effectively available federal forum to enforce rights arising under federal statutes.

The Court of Appeals also erred in deciding that judgment was improperly entered against respondent Carroll. Under the applicable standards of review, and in view of the evidence of record, the judgment entered by the District Court against respondent Carroll was clearly correct and should have been affirmed.

ARGUMENT

I. THE BROTHERHOOD OF RAILROAD TRAINMEN RESIDES FOR VENUE PURPOSES IN THE JUDICIAL DISTRICT OF COLORADO AND THE VENUE REQUIREMENTS OF 28 U.S.C. § 1391 HAVE BEEN SATISFIED.

When it denied the Brotherhood's motion to dismiss for improper venue, the District Court necessarily concluded that an unincorporated labor union resides for venue purposes in a judicial district in which (1) the union conducts its representational activities, (2) virtually all of the represented employees work and live, (3) the employer with whom the union negotiates and confers maintains its principal place of business and (4) the specific activity with

respect to which liability is asserted took place. The District Court found that these detailed circumstances met the residence requirement of § 1391 of the Judicial Code. As discussed below, this interpretation is supported by the legislative history of the statute in question, by the decisions of the federal courts and by the basic venue principles enunciated by this Court.

A. The Circumstances Attending the 1948 Revision of the Judicial Code Support the Holding of the District Court Regarding the Residence of the Brotherhood for Venue Purposes.

Since this is a civil action in which jurisdiction is not founded solely on diversity of citizenship, the venue requirements are stated by paragraph (b) of § 1391, that is, the action may be brought "only in the judicial district where all defendants reside." The venue requirement thus imposed is not defined insofar as unincorporated associations are concerned. In this respect, Congress adhered to the pattern of prior legislation for the statute which was superseded by the 1948 revision was similarly silent. The test which Congress intended the courts to follow, however, may be gathered from the circumstances attending the 1948 revision of the Judicial Code.

Prior to the revision of the Judicial Code in 1948, venue in non-diversity cases was governed by the requirement that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant" (28 U.S.C. § 112). In the absence of elaboration, the courts were required to determine whether a particular defendant was or was not an inhabitant of the judicial district in which the action was instituted. With respect to unincorporated associations, the prevailing law and the governing

principles had been enunciated by Judge Learned Hand in *Sperry Products* v. *Association of American Railroads*, 132 F. 2d 408 (2d Cir. 1942), which involved an interpretation of the venue provisions applicable to patent infringement actions. In *Sperry Products*, the relevant statute (28 U.S.C. § 109 (1940)) provided that a suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business."

Considering the venue status of an unincorporated association, Judge Hand first concluded that the association should be regarded as an entity rather than an aggregation of individuals. He then resolved the question of location and inhabitancy for such an entity as follows:

> "It is not altogether clear a priori how to attribute location to a collective venture even after one has called it a jural person. In the case of a corporation, courts for long evaded the difficulty by saying that it was located in the state of its incorporation within whose borders it was confined. Bank of Augusta v. Earl, 13 Pet. 519, 10 L.Ed. 274. It finally became evident, however, that this resulted in too much injustice to be tolerable, and eventually there was evolved the concept that a corporation could be 'present' outside its state, that fact being determined by the extent of its local activities. . . . Obviously the same situation arises whenever we are to determine the location of an unincorporated association. . . . *As to such an association the test must always be what it is for a corporation outside the state of its incorporation. Indeed it is troublesome to see in what other way one can attribute location to such an association at all. It does not violate common understanding to think of a common venture or enterprise as having spatial position wherever any part of those activities take place by which it is realized. That is a practicable test and*

> *it is really the only practicable test.* . . . There remains, so far as we can see, only what we have suggested; and we hold that the defendant Association was present wherever any substantial part of its activities were continuously carried on. Among those places was the Southern District of New York." (p. 411, emphasis added.)

In view of the tandem requirements of the statute, Judge Hand held that the Association, although present wherever it conducted a substantial part of its activities, was an inhabitant only of the judicial district in which it maintained its principal place of business.

Sperry Products thus resolved several crucial questions concerning the venue status of unincorporated associations. With respect to jural status, the Court held that such an association should be considered an entity for venue purposes, that it was consequently an inhabitant of the judicial district in which it maintained its principal place of business and was present wherever it maintained a regular and established place of business. The basic pervasive principle of *Sperry Products,* however, was its determination that unincorporated associations, accorded the characteristics of an entity for venue purposes, were thus comparable to and should be treated as corporations insofar as venue requirements are concerned. As Judge Learned Hand stated the matter, "It is really the only practicable test."

Since inhabitance was the requirement of the general venue statute as well as the patent infringement statute, courts generally followed *Sperry Products* in litigation involving the general venue statute. *Thermoid Co.* v. *United Rubber Workers of America,* 70 F. Supp. 228 (D.N.J. 1947); *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham,* 175 F. 2d 802 (D.C. Cir. 1948).

When Congress revised the Judicial Code in 1948, the venue requirement for defendants in non-diversity cases

was stated in terms of residence rather than inhabitancy. As stated, there was no elaboration of this requirement as to defendants other than corporations. Section 1391(c) provided that a corporation was to be considered a resident of the judicial districts in which it was licensed to do or was doing business. When Section 1391(c) thus defined the residence of corporations for venue purposes, however, the governing principle of *Sperry Products* made this definition equally applicable to unincorporated associations. The Congressional history of the 1948 revisions does not indicate any purpose to impose a new or different venue requirement for unincorporated associations from that which derived from the *Sperry* principle. Professor Moore who has been described by this Court as one "having importantly to do with" the 1948 revision (*Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227) has stated that § 1391(c) was intended to continue and to build on the trend of judicial decisions relating to venue requirements. (Moore's Commentary on the U.S. Judicial Code, pp. 194-195.) Insofar as unincorporated associations are concerned the trend of judicial decisions was unmistakably etched by the *Sperry* case. Appropriate regard for the Congressional purpose to adhere to the reasoning of judicial authority would clearly require an analysis and treatment of residence for unincorporated associations consistent with that applicable to corporations.

That this approach is both consistent with and is justified by the 1948 revisions of the Judicial Code is emphasized by Professor Moore's discussion of the subsequent judicial decisions to that effect. Referring to decisions applying the principle of § 1391(c) to unincorporated associations, Professor Moore states:

> "The position taken by these courts is desirable and there is a built-in protection from abuse contained in

28 USC § 1404(a). Although 28 USC § 1391(c) does not on its face apply to unincorporated associations, where [as here] an unincorporated association carries on multi-state activities, application of its principle is certainly justified." (1 Moore's Federal Practice 1508 (2d ed., 1964)).[1]

The Congressional purpose and assessment of policy considerations is demonstrated by the provisions of the Labor-Management Relations Act of 1947 (29 U.S.C.A. § 141, et seq.). It is also clear from this prior enactment that Congress, at the time of the revision of the Judicial Code in 1948, was intent on liberalizing venue rather than narrowing such requirements in suits against labor organizations arising under federal statutes. The relationship between the Labor-Management Relations Act of 1947 and the revised venue provisions of the Judicial Code was analyzed in *American Airlines Inc.* v. *Air Line Pilots Association*, 169 F. Supp. 777 (S.D.N.Y., 1958), as follows:

"The soundness of the rule of the Portsmouth case, at least in so far as it applies to labor organizations, is indicated by Section 301 of the Labor Management Relations Act of 1947, enacted prior to Section 1391, which liberalized jurisdiction and venue requirements in suits against them. 29 U.S.C.A. § 185.

"Section 301 provides:

"(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

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[1] The cases referred to by Professor Moore are discussed infra, pp. 17 to 21.

"It may well be that Section 301 applies to labor organizations generally in suits arising out of federal law. This is indicated by the limited application of subdivisions (a) and (b) of Section 301 as contrasted with the apparently unlimited application of subdivision (c). Nor is this view at all inconsistent with the legislative history of this section.

"But quite apart from this, Section 301 showed the mood of Congress with respect to suits against labor organizations arising under federal law at the time when Section 1391 was passed. * * *" (p. 782, emphasis added.)

We submit, therefore, that Congress in 1948 clearly intended, considering it most practical and desirable, that unincorporated associations should be regarded as residents of the judicial districts in which they were engaged in carrying on their business activities.

This conclusion, that the intent of Congress was to liberalize venue requirements in 1948, is supported by the decision of this Court in *Pure Oil Company* v. *Suarez,* 384 U.S. 202. This Court held that the definition of residence appearing in § 1391(c) of the Judicial Code should be read into the venue requirements of the Jones Act, which had theretofore been interpreted to limit venue to a corporation's principal place of business or state of incorporation. The Court emphasized that "there is nothing to show a Congressional purpose negativing" the transposition of the 1948 residence definition appearing in § 1391(c) to the Jones Act venue requirements which first appeared in the Merchant Marine Act of 1920. This Court emphasized also the "liberalizing purpose underlying" the enactment of § 1391(c) and held that in the absence of restrictive indications in the statutory language this liberalizing purpose could and should be implemented by the described interpretation of the 1920 venue provisions of the Jones Act.

All the above circumstances evidence a comparable liberalizing intent upon the part of Congress with regard to venue requirements applicable to labor unions. There is absolutely no indication in the legislative history that Congress intended in enacting § 1391(c) to negative or restrict the application of the principles of *Sperry Products* or its successors requiring similar treatment of corporations and unincorporated associations for venue purposes. There is every reason to conclude, therefore, that the Congressional purpose was correctly implemented by the holding of the District Court in the present case.

B. The Decisions of the Federal Courts Subsequent to 1948 Support the District Court's Construction of the Current Venue Provisions.

Since the 1948 revisions of the Judicial Code, numerous cases have held that, consistent with *Sperry*, § 1391(c) applies to unincorporated associations as well as corporations.

In *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers, et al*, 307 F. 2d 21 (2d Cir. 1962), certiorari denied, 372 U.S. 954, defendant railroad unions, including respondent in the present case, argued that venue in Vermont where defendants were representing employees was improper because their principal places of business were in Ohio (or, in the case of one defendant, Iowa) and unincorporated associations were liable to suit only in the district of their principal place of business. In holding against respondent and the other defendants, Judge Waterman stated that the 1948 revisions must be viewed in the light of pre-existing law, principally *Sperry Products:*

> "Under the venue provision drafted in 1948 courts were faced with the question whether they should follow Judge Hand and hold that an unincorporated associa-

> tion resides only at its principal place of business, or whether the process of assimilation which Judge Hand advocated should be extended by assimilating the treatment of unincorporated associations for venue purposes with the newly expanded concept of corporate residence." (p. 29.)

Judge Waterman went on to hold:

> ". . . we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing busines , the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958)." (pp. 29-30.)

The District Court in this proceeding correctly concluded, under *Rutland*, that the Brotherhood of Railroad Trainmen resides in and is "doing business" in Colorado for venue purposes. The ruling of the Court of Appeals below squarely conflicts with the Rutland decision and other authorities.

American Airlines v. *Air Line Pilots Association, International*, 169 F. Supp. 777 (S.D.N.Y. 1958) also held that § 1391(c) was intended to apply to unincorporated associa-

tions under the *Sperry* principle. In that case Judge Bryan said (at p. 782):

> ". . . it is plain from the Sperry case that under the general venue statute the word 'inhabitant' meant the same thing when used with respect to an unincorporated association as it did when used with respect to a corporation. Cf. Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed. 2d 786.
>
> "Thus, when Section 1391 was enacted in 1948 and changed the venue requirement from 'inhabitant' to 'resident' it was already the law as laid down by Judge Hand that an unincorporated association should be treated for venue purposes in the same manner as a corporation. Indeed, as the Supreme Court has indicated, the passage of § 1391 was not intended to change the law in any respect. Fourco Glass Co. v. Transmirra Corp., supra. So also the revisers' notes to Section 1391 indicate."

Other cases to the same effect as *Rutland* and *American Airlines* include *Portsmouth Baseball Corp.* v. *Frick,* 132 F. Supp. 922 (S.D.N.Y. 1955); *Chicago & North Western Ry. Co.* v. *Brotherhood of Locomotive Engineers,* 202 F. *Supp.* 277 (S.D.Ia. 1962); *Eastern Motor Express* v. *Espenshade,* 138 F. Supp. 426 (E.D.Pa. 1956) and *R & E Dental Supply Co., Inc.* v. *Ritter Co., Inc.,* 185 F. Supp. 812 (S.D.N.Y. 1959).

Professor Moore commends these decisions, characterizing them as "desirable" and "justified" under the 1948 venue provisions (1 Moore's Federal Practice (2d ed. 1964), p. 1508). To the same effect see Note, Federal Venue for Unincorporated Associations, 44 Cal. L. Rev. 130, 136, 140 (1956); Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1080 (1963).

Several cases, without considering the change in the law wrought by the 1948 revisions, have professed to follow the

Sperry case in holding that an unincorporated association resides only at its principal place of business. *McNutt* v. *United Gas Workers,* 108 F. Supp. 871 (W.D.Ark. 1952); *Griffin* v. *Illinois Central R.R.,* 88 F. Supp. 552 (N.D.Ill. 1949); *Salvant* v. *Louisville & N.R. Co.,* 83 F. Supp. 391 (W.D.Ky. 1949). These cases justify this conclusion by citing *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham,* 175 F. 2d 802 (C.A.D.C. 1948). In the *Graham* case, however, the Court of Appeals based its decision on the provisions of the Judicial Code preceding the 1948 revisions, noting that the trial court had relied upon the pre-1948 venue provisions (fn. 2, p. 804).

The only case since 1948 where it appears that a court refused to follow the principle that an unincorporated association should have the same venue as a corporation under § 1391(c) is *Cherico* v. *Brotherhood of R. R. Trainmen,* 167 F. Supp. 635 (S.D.N.Y. 1958). That case was later rejected, however, by the Court of Appeals for the same circuit in *Rutland Railway Co.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21, 29 (2d Cir. 1962).[1]

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[1] Section 1391(b) of the venue statute was amended by Public Law 89-714, approved on November 2, 1966, by addition of the italicized words in the following quotation of that Section:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *or in which the claim arose,* except as otherwise provided by law."

The same words were added to Section 1391(a). As the Congressional Committee Reports state, this amendment is intended to provide an additional choice of forum for litigants in the federal courts:

> "Subsection 1391(b) would be amended to authorize a civil action wherein jurisdiction is not founded solely on diversity of citizenship to be brought in the judicial district in which the claim arose as well as the district where all defendants

It is thus indisputable that the decision of the Court of Appeals in the present case, holding that venue as to an unincorporated association is proper only where it maintains its principal place of business, is in conflict with and contrary to the weight of authority represented by the *Rutland* case, and the other cases discussed and cited above.

Significantly, the *Rutland* case and the present case involve the same basic facts and a common unincorporated association. In *Rutland,* the Brotherhood of Railroad Trainmen was one of the four appellants raising the venue question (307 F. 2d 21, 24). Moreover, the activities of the Brotherhood upon which the Court predicated its conclusion that venue was proper in Vermont are the same type as those shown by the record in the present case. The activities in *Rutland* were described by the Court as follows:

> "Turning to the case before us, we hold that the defendant brotherhoods were doing business in the District of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was

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reside." (Report No. 1893, Committee on the Judiciary, House of Representatives, 89th Cong., 2nd Sess., pp. 1-2.)

Since Congress obviously amended the statute to expand the forums available under the prior venue provisions, a definition of residence more restrictive than that properly attributable to the pre-existing statute would conflict with the implicit Congressional purpose. Consequently, the question as to the residence of unincorporated associations for venue purposes remains one of paramount importance on which the Tenth and Second Circuits are in basic disagreement.

proper and we affirm the order of the court below denying the motions to dismiss." (p. 30.)

In the instant case, as in *Rutland,* venue is especially appropriate in the district in question, for the challenged activities occurred there, the Brotherhood concededly does business there, and respondent Carroll resides there (R. 5-6, 11-12, 73).

C. The Basic Venue Principles Enunciated by this Court and the Circumstances of this Case Clearly Establish that the Judicial District of Colorado is the Most Appropriate Forum.

Commenting on the 1948 revisions of the Judicial Code, this Court in *Pure Oil Co.* v. *Suarez,* 384 U.S. 202, stated that the venue provisions of § 1391 were designed to "bring venue law in tune with modern concepts of corporate operations" (p. 204), and constituted "a response to a general conviction that it was intolerable if the traditional concepts of residence and presence kept a corporation from being sued wherever it was creating liabilities" (fn. 3, p. 204).[1] In the earlier case of *Neirbo Co.* v. *Bethlehem Corp.,* 308 U.S. 165, where this Court dealt comprehensively with the question of proper venue, the underlying basis of the decision was the principle that venue "though defined by legislation relates to the convenience of litigants" (p. 168). The principles thus enunciated, which are fully applicable to unincorporated associations conducting multi-state business activities, clearly support the conclusion that the judicial district of Colorado is the proper and most appropriate forum in the present case. The particular activities upon

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[1] The decision of the lower court, which this Court affirmed, expressed these basic considerations as follows:

"There is a shocking inconsistency in a rule of law which permits a corporation to maintain a regular, established place

which liability is predicated, the outward manifestations of the collective bargaining relationship between the parties and the focal instrumentalities and processes through which the Brotherhood acts as a representative of the Rio Grande's employees are all Colorado oriented. The holding of the Court of Appeals that Cleveland, Ohio, is the proper forum for the trial of this case is thus completely contrary to the recognized and fundamental determinants of proper venue.

The plaintiff involved in the dispute obviously conducts the vast majority of its operations in the judicial district of Colorado (R. 57). The officers of the employing railroad who are involved in labor relations matters work and reside in Colorado and the decisions made by such officers in labor disputes involving the Brotherhood of Railroad Trainmen and the Rio Grande are made and are effectuated in the judicial district of Colorado (R. 147-148).

Insofar as the Brotherhood and its members are concerned, the immediate activity giving rise to this proceeding took place in the judicial district of Colorado. The unlawful strike occurred primarily in Colorado although it

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of business in the district in question, transact a substantial amount of business there both before and after the event about which the plaintiff complains and at the time the suit is filed with the expressed intention to continue doing business in such locale, but allows the corporation to insist on a trial of the factual issues in the district in which it is incorporated or in which its principal office is located. To do so would authorize it 'to run with the hare and hold with the hound.'

". . . it would be unjust to permit the offending corporation to continue its operations, in the course of which it also may be creating liabilities, and at the same time to grant it complete immunity from those liabilities by shielding it with a carapace of technical venue construction." (*Pure Oil Co.* v. *Suarez*, 346 F. 2d 896-97.)

also affected the operations of the Rio Grande in other states (R. 18, 59). Most of the employees participating in the strike on behalf of the Brotherhood of Railroad Trainmen were and are residents of Colorado and the service which they perform for the Rio Grande is performed in Colorado.

Further, the entire collective bargaining relationship between the Brotherhood and the Rio Grande, and the Brotherhood's activities on behalf of the Rio Grande's employees whom it represents, has Colorado as its focal point. Although the entity (Brotherhood of Railroad Trainmen) certified to represent trainmen on the Rio Grande has its principal place of business at Cleveland, Ohio, it is a party to the basic collective bargaining agreement between the Brotherhood and the Rio Grande *only* by virtue of the signature of General Chairman R. E. Carroll on its behalf. General Chairman Carroll is a resident of Colorado and maintains his place of business at Denver, Colorado.[1] Thus, with regard to the governing agreement and the basic collective bargaining relationship, the national union entity with its principal place of business at Cleveland, Ohio, is represented by and performs its functions on the Rio Grande through a Colorado resident whose activities are concentrated geographically in the judicial district of Colorado.

In the day to day functioning of the collective bargaining relationship, the disputes which may arise involve either

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[1] The collective bargaining agreement between the parties is referred to in the amended complaint, by the Brotherhood in its proposed findings of fact, and is identified by the District Court (R. 7, 46, 58). Although the entire document consisting of 155 printed pages is not reproduced in the record, it is on file with the National Mediation Board as required by § 5, First(c) of the Railway Labor Act (45 U.S.C.A. § 155, First(c)).

proposed changes in the existing agreement or disputes concerning its interpretation or application. This Court has described those traditional disputes in terms of "major" and "minor" disputes (*E.J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711). The manner in which the activities of the Brotherhood in such disputes, as the certified representative of trainmen on the Rio Grande, focus on Colorado is evident from an examination of the Constitution and General Rules of the Brotherhood of Railroad Trainmen reproduced in Appendix B hereto.

As the Constitution and General Rules show, the Brotherhood consists of a grand lodge with headquarters at Cleveland, Ohio, and a series of subordinate lodges, each located on the lines of the railroads on which the Brotherhood holds representation rights (App. B, p. 43). On each railroad the Constitution requires the local lodges to form a general grievance committee and it is this general grievance committee on the Rio Grande which is headed by respondent Carroll (App. B, pp. 44-45). With respect to grievances or so-called minor disputes, the Constitution and General Rules invest the local committees and finally the general grievance committee with virtually complete authority to initiate, confer, negotiate and otherwise handle claims on behalf of the trainmen employed by the Rio Grande (App. B, pp. 44-46). Ultimate reference of such claims to the National Railroad Adjustment Board is also within the authority of the general grievance committee as shown by the claims and the awards involved in the present litigation (Awards 19372 and 19389 of the First Division of the National Railroad Adjustment Board). The local handling of such disputes is in fact contemplated by the provisions of the Railway Labor Act in addition to the Constitution and General Rules of the Brotherhood. Thus § 2, Sixth of the Act provides that the conferences

to be held with respect to disputes arising out of grievances or out of the interpretation or application of agreements shall be held upon the line of the carrier involved (45 U.S.C. § 152, Sixth).

The general grievance committee and its constituent local committees on the Rio Grande as well as the other railroads are also given primary jurisdiction to initiate and progress proposals for changes in the agreement which may eventuate in so-called major disputes under the Railway Labor Act.[1] The real and primary authority of the representatives of the Brotherhood operating in the form of the general grievance committee is indicated by General Rule 13 which provides as follows:

> "Whatever action may be taken by the general grievance committee of any system within the meaning of the above general rules shall be law to the lodges on that road or bus line until or unless reversed by the Board of Appeals." (App. B, p. 50)

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[1] The functions and official capacity of the General Chairman and the local committees on an individual railroad in major disputes arising out of proposed contract changes are described by Judge Holtzoff in recent litigation involving the nation's railroads and the Brotherhood of Railroad Trainmen as follows:

> "The defendant Brotherhood of Railroad Trainmen, as its name indicates, is composed of trainmen employed by various railroads. It is likewise a national organization, with its headquarters in Cleveland. Its President is Charles Luna, who is aided by an assistant and vice presidents assigned to various regions. An official of the Union, known as a General Chairman, is attached to every railroad or group of railroads. In turn, he is assisted by local committees. Conferences involving a single railroad are ordinarily conducted either by a local committee, or by the General Chairman assigned to the carrier . . . ."
>
> (*Atlantic Coast Line R. Co. et. al.* v. *Brotherhood of Railroad Trainmen*, 262 F. Supp. 177, 185 (D.D.C., 1967))

As stated, the instrumentality acting on behalf of the Brotherhood which formulates the "law" on the Rio Grande is a locally constituted and locally centered instrumentality.

Although the president of the Brotherhood, who maintains his office at Cleveland, Ohio, does exercise residual supervisory or appellate authority, the general structure of the Brotherhood clearly demonstrates that its activities on behalf of the employees of an individual railroad such as the Rio Grande are initiated, conducted and, in most cases, concluded in the geographical area where the railroad operates. General Rule No. 12, which deals with participation by grand lodge officers in the organization's activities on an individual railroad, limits such participation to the situations in which the general grievance committee makes a proper request of the president (App. B, p. 49). Following such a request the general grievance committee on the individual carrier continues to participate in the activities of the Brotherhood jointly with the president or other assigned officer of the grand lodge. Such joint participation in the present case is indicated by the fact that Vice President McDonald and General Chairman Carroll conducted the negotiations and discussions with the Rio Grande just prior to the strike in question and jointly signed the letter advising the Rio Grande that the strike would commence at a specified time (R. 23, 147-148).

A provision of General Rule No. 12, which is of particular importance here, relates to the manner in which strike action on an individual railroad must be authorized. The relevant provision is as follows:

> ". . . the matter will be referred to the full general grievance committee, with a concise statement of the entire controversy, together with the result of their attempt to adjust the controversy with the managing officers of the property, and if two-thirds or more of the

members of the general grievance committee vote in favor of withdrawing from the service rather than continue under the conditions specified by the company, the President of the Brotherhood and the general grievance committee shall have authority to sanction a strike, that is, to approve of a concerted and peaceable withdrawal from the service of all members of the Brotherhood employed in train, yard or bus service on the system or part thereof affected; provided, however, nothing in this rule shall prohibit the circulation of a referendum strike ballot when it appears that the best interests of the membership would not be jeopardized by the delay incident thereto." (App. B, pp. 49-50)

Thus even the final step in the process is one in which the general grievance committee is the major participant. The president may authorize the strike only if the general grievance committee joins with him in such authorization and the possibility is always open that a referendum of the membership on the property may be used to decide the question.

These provisions make it highly unreasonable to suggest that Cleveland, Ohio, rather than the judicial district of Colorado is the proper forum in which to litigate the liability of the Brotherhood with respect to the unlawful strike conducted on the Rio Grande. The Brotherhood's business of representing employees of the Rio Grande, although based on certification of the national entity, is conducted in Colorado by duly authorized officials of the Brotherhood who are residents of Colorado. Here, as would be true in many situations involving the Brotherhood's multi-state activities, Cleveland, Ohio, simply has no real relationship to the basic activities and the significant facts involved in the litigation. The basic determinants of proper venue, as enunciated by this Court, thus clearly support the conclusion of the District Court that the judicial district of Colorado is the proper forum.

This interpretation of the residence requirements of § 1391 of the Judicial Code does not leave the Brotherhood without adequate safeguards against inconvenient forums. In the first place, a determination must be made in each case as to whether or not the unincorporated association is doing business in the judicial district chosen by the plaintiff. In the present case (as in the *Rutland* case) this requirement was met by showing the very substantial activity on the part of the Brotherhood in the judicial district concerned. Furthermore, a transfer may be sought in any event under the provisions of § 1404 of Title 28 of the Judicial Code if inconvenience can be shown by the defendant. Both these requirements and available procedures serve as ample protection against an improper or unreasonable choice of forum by the plaintiff.

II. STEELWORKERS v. BOULIGNY, INC., 382 U.S. 145, IS IRRELEVANT TO THE VENUE QUESTION INVOLVED AND CANNOT ON ANY THEORY SUPPORT THE RESULT REACHED BELOW.

In holding that venue as to the Brotherhood of Railroad Trainmen is proper only at Cleveland, Ohio, the Court of Appeals was governed primarily by its interpretation of this Court's decision in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145. The opinion of the Court of Appeals does not reflect any effort at statutory interpretation or any basic disagreement with the principle and policy of the *Rutland* case. Instead, the Court based its decision on the conclusion that (1) *Steelworkers* v. *Bouligny* was an implicit "rejection of the principle espoused by the *Rutland* case" and that (2) venue as to the Brotherhood would thus be proper only at the Brotherhood's principal place of business, i.e., Cleveland, Ohio. We respectfully suggest that both aspects of this conclusion are erroneous.

A. *Steelworkers* v. *Bouligny* was not in any Way Concerned With Venue Principles or Cases.

The *Steelworkers* case did not involve any venue questions, and this Court neither discussed nor cited any cases dealing with venue principles. The issue presented in the *Steelworkers* case, as this Court stated, was "whether an unincorporated labor union is to be treated as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members" (382 U.S. 145, 147). The lower court had held that for diversity purposes, the citizenship of an unincorporated association is that of each of its members. This Court affirmed, rejecting the argument that an unincorporated association should be considered an entity and a citizen of the state in which it maintained its principal place of business. The Court emphasized that if an unincorporated association were treated as a jural entity for diversity purposes with its citizenship determined as if it were a corporation, a considerable expansion of the diversity jurisdiction of federal courts would inevitably follow. Holding that only Congress under Article III of the Constitution can extend the jurisdiction of federal courts, the Court stated that such "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts" (*Id.* at 150-51). In the present case, jurisdiction is based on alleged violations of a federal statute and the venue question thus does not involve an expansion or contraction of federal court jurisdiction.

In holding that the citizenship of each individual member of an unincorporated association governs for diversity purposes, the Court adhered to a long established principle (*Chapman* v. *Barney*, 129 U.S. 677). The federal courts,

however, have distinguished between the principles applicable when determining the citizenship of an unincorporated association for diversity jurisdiction and those relevant to a determination of the inhabitancy or residence of an unincorporated association for venue purposes. These different principles have co-existed and there is nothing about the *Steelworkers* case which indicates any intent or need to change the existing principles.

This concurrent but unrelated development of venue and jurisdictional principles is illustrated by *Sperry Products* v. *Assn. of American Railroads, supra.* Judge Learned Hand carefully distinguished the jurisdictional considerations and stated, as this Court held in *Steelworkers,* that:

> ". . . [I]n the matter of jurisdiction over the subject matter, an unincorporated association is disregarded: when for example jurisdiction depends upon diversity of citizenship, it is the citizenship of the members alone which counts. Levering & Garrigues Co. v. Morrin, 2 Cir., 61 F. 2d 115. Thus, for most purposes the law still looks at such associations as mere aggregations of individuals." (pp. 410-411.)

He then observed, however, that different principles should determine the venue question before him:

> "Since, however, for the purpose of suit it [United Mine Workers v. Coronado Coal Co., 259 U.S. 344; Rule 17(b) of Federal Rules of Civil Procedure] has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents." (p. 411.)

Thus recognizing that different principles apply in determining inhabitancy of an unincorporated association for venue purposes as contrasted with determination of citizen-

ship for jurisdictional purposes, Judge Hand held that the unincorporated entity should be treated as a corporate entity in order to determine its inhabitancy for venue purposes.

Similarly, in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* the Court of Appeals for the Second Circuit noted that "Venue in the Federal Courts is not a jurisdictional concept" (307 F. 2d 21, 29). The essential issue presented to the court in the *Rutland* case was whether or not the process initiated by Judge Hand in *Sperry Products* should be continued by applying to unincorporated associations the corporate venue requirements of the Judicial Code as amended in 1948, just as Judge Hand had applied such requirements to unincorporated associations prior to the 1948 amendments. As stated, the issue before this Court in the *Steelworkers* case did not involve any such question. This Court neither cited nor purported to disapprove cases such as the *Rutland* case involving venue determinations. In substance and effect, this Court approved the prior decisions relating to diversity jurisdiction and refused to attribute to unincorporated associations a citizenship apart from the citizenship of all of its individual members. This holding with respect to the citizenship of unincorporated associations is wholly irrelevant to the venue issue presented here.

The holding of the Court of Appeals in this case assumed that this Court, in upholding a long standing jurisdictional principle, overruled a long line of venue cases without the slightest reference to them and that it established basic venue doctrine without any mention of the subject. This Court's opinion, however, carefully confined its holding to the precise issue raised. Thus, this Court's statement of the issue limits it to a determination of the citizenship of

an unincorporated labor union "for purposes of federal diversity jurisdiction" (382 U.S. 145, 147), and in evaluating the arguments advanced by counsel representing the unincorporated association the Court limited itself to "the force of these arguments in relation to the diversity jurisdiction" (382 U.S. 145, 150). The concluding paragraph of the opinion emphasizes again that the decision is limited to the status of unincorporated labor unions "for diversity purposes" (p. 153). We respectfully submit that the decision by this Court, affirming its prior determinations with respect to the status of unincorporated associations for diversity purposes, cannot and should not be read to accomplish the rejection of numerous cases and principles which have prevailed for many years with respect to the venue of federal courts.

B. *Steelworkers* v. *Bouligny*, if Deemed Relevant to Venue Questions, Conflicts With the Decision of the Court of Appeals.

Even if the principles affirmed in *Steelworkers* v. *Bouligny*, 382 U.S. 145, were relevant to venue questions, the lower court's resolution of what it described as the vital venue issue in the present case is inconsistent with the *Steelworkers* decision. The Court of Appeals stated the question to be decided as follows:

> "Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado or in Cleveland, Ohio, where its headquarters and principal place of business is located." (R. 151.)

Apparently the court below resolved the issue so posed by deciding that the Brotherhood is a resident of Cleveland, Ohio, where it has its principal place of business. This result, however, can only be reached by treating the

Brotherhood, an unincorporated association, as an entity and thus arriving at a result comparable to that reached by Judge Hand in *Sperry Products*. As the preceding discussion shows, Judge Hand and subsequent courts assimilated an unincorporated association to a corporation. In the absence of such assimilation, the unincorporated association would be regarded as an inhabitant or resident of the places inhabited by its members or at which its members reside.[1]

A similar result would follow from applying the rationale of the *Steelworkers* case to the venue residence problem here involved. This Court in *Steelworkers* recognized that unless it treated the unincorporated association as a corporation for purposes of determining its citizenship, "the generally prevailing principle that an unincorporated association's citizenship is that of each of its members" would control for diversity purposes (382 U.S. 145, 146). Consequently, if the decision of this Court in *Steelworkers* were controlling, then the residence of the Brotherhood for venue purposes would necessarily be the aggregate residence of its members, not its principal place of business. Thus, the *Steelworkers* decision cannot possibly be used to arrive at the result indicated by the court below.

A logical application of the *Steelworkers* rationale would have required the court below to reject both of the alternatives posed in its statement of the crucial issue quoted above. Attempting to apply the principles of *Steelworkers* to the concept of residence for venue would result in holding that the residence of the Brotherhood is not Colorado or Cleveland, Ohio, but is instead the aggregate of all of the many

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[1] Judge Hand recognized this consequence, stating:

"... for most purposes the law still looks at such associations as mere aggregations of individuals." (132 F. 2d 408, 411.)

states or judicial districts in which its members reside. In the case of the Brotherhood of Railroad Trainmen, which has members in virtually every judicial district, the residence requirement of § 1391 could never be met since there is no single judicial district in which all of its members reside. If such an interpretation of residence for venue purposes prevailed, no national union or widespread unincorporated association prior to November 1966[1] could have been made a defendant in any federal court with venue based on Section 1391(b), despite the obvious Congressional desire to provide an effective federal forum for the vindication of rights based on federal statutes.

Insofar as venue issues in this case are concerned, the recent decision of this Court in *Pure Oil Company* v. *Suarez*, 384 U.S. 202, is considerably more relevant than the *Steelworkers* decision. In the *Pure Oil* case this Court had before it the venue requirements of the Jones Act which provided that venue would be proper in the district in which the defendant employer resides or in which his principal office is located. This Court stated the issue and its resolution thereof as follows:

> "Preliminarily it should be noted that although this provision is framed in jurisdictional terms, the Court has held that it refers only to venue, *Panama R. Co.* v. *Johnson*, 264 U.S. 375. It is conceded that as enacted and originally interpreted the statute would not authorize Florida venue in this instance, for corporate residence traditionally meant place of incorporation, in this case Ohio, and Pure Oil's principal office is in Illinois. The Court of Appeals held, however, that residence has been redefined by the expanded general venue statute,

[1] The expansion of available forums under the venue sections of the Judicial Code, accomplished by the November 1966, enactment of Public Law 89-714, is discussed at page 20, *supra*.

28 U.S.C. § 1391(c) (1964 ed.), passed in 1948. That statute provides:

> "'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the *residence* of such corporation for venue purposes.' (Emphasis added.)

"If this definition of residence is applicable to the Jones Act venue provision, it is conceded that the action was properly brought in Florida, where Pure Oil has transacted a substantial amount of business. We hold that this definition does so apply and that venue in Florida was proper." (pp. 203-04.)

This Court stated the controlling principle as follows:

> "Although there is no elucidation from statutory history as to the intended effect of § 1391(c) on special venue provisions, the liberalizing purpose underlying its enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute." (pp. 204-05.)

The substance of this Court's decision in the *Pure Oil* case is that the subsequent definition of residence for venue purposes contained in the general venue statute should be applied to the venue requirement of the Jones Act, although the amendment to the general venue statute does not expressly indicate an intent to thus amend the requirements of the Jones Act. The same approach in the present case would require the result reached by the Court of Appeals for the Second Circuit in the *Rutland* case. The essential effect of the *Rutland* case was to update the concepts formulated by Judge Hand in *Sperry Products* to make them consistent with the 1948 amendments, just as the

Pure Oil case updated the venue requirements of the Jones Act.

III. THE COURT OF APPEALS CLEARLY ERRED IN SETTING ASIDE THE JUDGMENT OF THE DISTRICT COURT HOLDING R. E. CARROLL LIABLE FOR THE DAMAGES ACCRUING FROM THE UNLAWFUL STRIKE.

On the basis of the record, the District Court concluded that respondent Carroll shared responsibility for the unlawful strike and should therefore be held accountable for the damages sustained by the Rio Grande. The Court of Appeals set this judgment aside without any reference to the scope of review in such instances. Its action, we submit, was contrary to the principle that "findings of fact shall not be set aside unless clearly erroneous" (Fed. R. Civil P. 52(a)).

Respondent Carroll's responsibility for the strike is most conclusively fixed by the documents of record relating to the institution and cessation of that illegal withdrawal from service. With respect to the institution of the strike, counsel for the Brotherhood stated that the strike was called "pursuant to a letter that was sent to the railroad on May 16 . . ." (R. 28). The crucial document thus identified is a letter addressed to the Rio Grande stating that "the strike of brakemen is reset for 2:00 P.M., May 16, 1960" (Ex. 1, R. 147-148). This letter, emanating from respondent Carroll's Denver office, is signed by two individuals, R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, and R. E. Carroll, General Chairman of the Brotherhood of Railroad Trainmen. This document reflects the fact that the overall responsibility of the Brotherhood in the premises was shared by respondent Carroll as the General Chairman of the Brotherhood of Railroad

Trainmen and Mr. McDonald as a vice president of the Brotherhood of Railroad Trainmen.[1]

With respect to the status and termination of the strike, respondent Carroll testified that he issued instructions "calling off the strike" by "telephoning and sending the telegrams" (R. 74-75). Respondent Carroll's testimony on this subject clearly shows that his authority in the premises was primary and that his instructions were final and determinative as to whether the strike was to continue or terminate. Accordingly, the District Court correctly found and concluded that respondent Carroll was responsible for, and was liable for the damages resulting from the unlawful strike.

The Court of Appeals suggested that since the local chairmen were dismissed from the action, respondent Carroll also should have been dismissed (R. 152). It was the view of the Court of Appeals that "Carroll had no more to do with causing the strike than did the chairmen of the locals . . ." (R. 152). This statement is contrary to all of the evidence relating to the subject. There is no evidence of record that the local chairmen were responsible for instituting the strike in question. The significant difference in the record between respondent Carroll's situation and that of the local chairmen was, in fact, recognized by counsel for the Brotherhood during the trial in the District Court. At the pretrial conference when the documents referred to above had been produced, counsel for the respondents stated:

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[1] This is also obvious from the provisions of the Constitution and General Rules of the Brotherhood which require joint authorization of a strike by the president or his designee and the General Grievance Committee of which respondent Carroll is Chairman (App. B, pp. 49-50).

> "Any of the documents that have been produced would only show that Mr. Carroll was *the only one who had any connection with it at all.*" (R. 36, emphasis added.)

At the conclusion of the trial in the District Court the proposed findings submitted by the respondents recognized this state of the record. Thus, proposed finding No. 7, submitted by respondents, was as follows:

> "The Trial record does not sustain the allegations of the complaint with respect to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather. These defendants are not shown to have participated in any way in the calling or conduct of the strike nor is there any evidence with respect to their relationship, if any, with the Brotherhood." (R. 48.)

Respondent Carroll is not among the individuals listed in this proposed finding.

Counsel for respondents emphasized both the absence of any evidence of responsibility on the part of the local chairmen and the undoubted responsibility of respondent Carroll at the conclusion of the trial, as shown by the following:

> "The Court: There is another matter I think we might iron out here and now. The case is against the Brotherhood of Railroad Trainmen and certain named individuals.
>
> "Now, with the exception of Mr. Carroll, I haven't heard any testimony about these other individuals.
>
> "Mr. Cummings: That was briefed before Judge Phillips, Your Honor, and—
>
> "Mr. Highsaw: The question that was briefed before Judge Phillips, Your Honor, was whether or not having named these people in the complaint they had properly stated a class action, but now we have had

> in evidence and the record is closed on the question of the strike and I agree with you there is no evidence at all that anyone had anything to do with this strike *other than* the Brotherhood and Mr. Carroll, ..." (R. 145, emphasis added.)

It is apparent, therefore, that at the conclusion of the proceedings in the District Court there was agreement between all of the parties that responsibility for the strike was that of respondent Carroll and the Brotherhood.

The Court below also suggested as a reason for its ruling that respondent Carroll "was not an officer of the union" (R. 152). When respondent Carroll testified in this action he identified himself as "General Chairman of the General Grievance Committee, Brotherhood of Railroad Trainmen on the D&RGW" (R. 73). An affidavit by respondent Carroll reiterates his official capacity as "chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Denver and Rio Grande Western Railroad system" (R. 11).

The General Grievance Committee, of which respondent Carroll is the Chairman, is the agency through which the Brotherhood functions insofar as its representation rights on the Rio Grande are concerned and respondent Carroll, of course, is the head of that instrumentality. Perhaps the clearest proof of the important official capacity which respondent Carroll occupies in the Brotherhood is the fact that the basic collective bargaining agreement between the Rio Grande and the Brotherhood is signed on behalf of the Brotherhood by respondent Carroll alone. There is no other Brotherhood signatory to that agreement, which respondent Carroll signed as "General Chairman, Brotherhood of Railroad Trainmen."

This case was tried by the District Court without a jury. Pursuant to Rule 52(a) of the Federal Rules of Civil Pro-

cedure, in such cases the "findings of fact shall not be set aside unless clearly erroneous." This Court has stated in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948) that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We most respectfully submit that the entire evidence shows that respondent Carroll is not only an officer of the Brotherhood but is the governing officer of that organization on the Rio Grande. Accordingly, the District Court's determination that respondent Carroll was responsible for the damages caused by the Brotherhood's unlawful strike was clearly correct and the action of the Court of Appeals in setting it aside was erroneous.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed with directions to the Court of Appeals to proceed to a consideration of the issues other than venue which were raised by the appeal from the judgment of the District Court.

Respectfully submitted,

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